IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO.8 OF 2006

...

Vikas Cargo Movers Pvt.Ltd. ...Appellant

v/s.

The Indian Ordinance Factories ...Respondent

...

Mr.Ashish Kamat with Smt.Swati V.Deshpande for the Appellant.

Mr.V.M.Bhate h/f Mr.S.S.Sarkar for the Respondent.

...

CORAM: D.K.DESHMUKH, J.

DATED: 14th June, 2006

P.C.:

The facts that are relevant are that the Appellant had undertaken the work of transporting goods of the Respondent from one place to other. It transpires that one of the consignment that was entrusted to the Appellant was lost. The value of that consignment which was lost was deducted by the Respondent while making payment of transportation charges to the Appellant. There was an arbitration clause. Therefore a reference was made by the Appellant to arbitrator. The contention of the Appellant was that the amount could not have been deducted from the amount payable to him against the contracts which were successfully completed. Award was made by the arbitrator holding that the Respondent was entitled to deduct the amount. That award was challenged under Section 34 of the Arbitration Act before the District Judge, Kalyan. The District Judge had dismissed the petition by his order dated 20-1-2005. The present appeal is preferred against that order.

2. Perusal of the order passed by the District Judge

shows that only two questions were argued before the learned District Judge. First question was that because the Appellant had undertaken the work of transporting the goods for the Respondent pursuant to the tender submitted by the Appellant to the Respondent, he is not covered by the definition of the term "Common Carrier" found in the Carriers Act, 1865. The second question that was argued was that the goods were entrusted to the Appellant for transportation and therefore the Appellant is a bailee and the liability of the Appellant as a bailee does not extend to the damages caused by the acts or defaults of third person which could not by ordinary diligence have been foreseen or prevented.

3. Perusal of the order passed by the District Judge further shows that the court has held that the crucial question to be decided is whether the Appellant has established that he is not covered by the definition of the term "common carrier". The court has held that once it is found that the Appellant is a common carrier then he would be liable to make good the loss of the goods suffered by the Respondent. The District Court has considered the definition of the term common carrier appearing in

Carriers Act, 1865. The learned Counsel appearing for the Appellant urged before me that the amount of the value of the goods which was lost was deducted from the amount payable to the Appellant under the contracts which were successfully completed by the Appellant and therefore the deduction was unauthorised. Though this point was argued before me, perusal of the order of the learned District Judge shows that this contention was not urged before the learned District Judge and therefore it cannot be permitted to be raised for the first time before this Court. Therefore, the only question to be considered in this appeal is whether the District Judge was justified in holding that the Appellant has not successfully demonstrated that he is not covered by the definition of the term "common carrier". Perusal of the definition shows that a person who carries on a business of transportation of goods is included in the definition of the term common carrier. The Appellant claims that he is not a common carrier because for undertaking the work of transportation for the Respondent, the Appellant has submitted a tender. In my opinion, however, merely because for getting the contract of transportation of goods of the Respondent, the Appellant had submitted a tender

would not take the Appellant out of the definition of the term common carrier, if the Appellant carries on the business of transportation of goods generally.

4. Perusal of the statement of claim shows that there are no necessary pleadings made by the Appellant to show that he does not carry on business of transportation of goods generally. As there are no necessary pleadings to be found in the statement of claim obviously there can neither be evidence on that nor the Appellant can successfully get a finding in his favour.

5. Thus, I find that the view that has been taken by the learned District Judge of the award is a possible view and considering the limited jurisdiction of the court under Section 34 of the Act, in my opinion, the District Judge has rightly dismissed the petition. There is no reason to interfere with the order. Appeal disposed of.

...